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v.

BANKERS' TRUST COMPANY, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The question of the applicability of section 77 (c) (12) of the Bankruptcy Act to claims for compensation and expenses of indenture trustees in reorganization proceedings is one which the Interstate Commerce Commission considers of extreme importance in the proper administration of these provisions. As has been pointed out in the petition for certiorari, these claims comprise a substantial portion of the total allowances in railroad reorganizations. To exempt them from the operation of subsection (c) (12) presents a serious handicap to the Commission in formulating and approving a plan of reorganization.

The Commission has consistently interpreted its powers to fix maximum limits as extending to such claims.[1] It has presented its views in a number of court proceedings wherein the issue has been raised, including the instant case.

The Commission adopts generally the brief and argument of Reconstruction Finance Corporation, petitioner. It desires, however, to state briefly its position with respect to several of the points therein as well as in the briefs, *amici curiae*, of the Trustees of the New York, New Haven and Hartford Railroad Company, of the Irving Trust Company, and of Frank C. Nicodemus, Jr.

I

The background, purpose, and legislative history of subsection (c) (12); as well as practical administration, require that all compensation for services rendered and reimbursement for expenses incurred in connection with the proceeding and plan be passed upon in the first instance by the Commission and that no one participating in the proceeding before the Commission shall receive reimbursement out of the debtor's estate for services or expenses except as the court may allow within maximum limits determined by the Commission.

The Commission, in exercising jurisdiction to fix maximum allowances for trustees under indentures, is following the plain language of the

[1] See petition for certiorari, pp. 10–11.

Act and its carefully drawn structure. Where the court, without prior action by the Commission, is charged with the task of making allowances, this authorization is explicitly provided in the statute. Thus the court, without Commission action, may set aside, as unreasonable, provisions for compensation in proxy or deposit agreements which were in force prior to August 27, 1935, the date from which the Commission was required to pass upon such agreements, including provisions therein for compensation. Section 77 (p). Also, the court may allow reasonable compensation to any Master designated to serve by the court and selected by it from a panel named by the circuit court of appeals. Section 77 (c) (13). Again, the court may order payment of reasonable administrative expenses and allowances incurred in any prior proceeding pending at the time the Section 77 proceedings begin. Section 77 (i). The reasons for vesting control over allowances in the court alone in these special circumstances are obvious. The careful enumeration of these exceptional instances makes even more pointed the express inclusion of allowances to indenture trustees in the comprehensive provisions of Section 77 (c) (12) vesting authority to fix maximum allowances in the Commission.

The statute does not attempt to classify applicants for compensation and expenses as "volunteers" or "nonvolunteers" as certain of the *amici*

curiae contend should be done.[1] Indenture trustees are, indeed, given a certain favored position as compared with most representatives of parties in interest, in that only indenture trustees, along with depositaries[2] and assistants specially employed by the Commission with the approval of the court, are entitled to reasonable compensation in addition to reasonable expenses. So much is provided in terms by Section 77-(c) (12). Any other differentiation in treatment, of a procedural nature, would require a rewriting of the statute.

II

The Commission contended in the court below that no lien on the mortgaged property accrues to the indenture trustee either contractually or at common law by virtue of its participation in the

[1] The brief of Frank C. Nicodemus, Jr., as amicus curiae, attempts to inject into this case the extraneous issue that the *debtor* being charged with affirmative duties under the act is exempt from the provisions of subsection (c) (12). Certainly if, as provided in section (c) (2) "trustees [of the debtor] and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable," it cannot be assumed that the statute gives the debtor and its counsel different and preferred treatment.

[2] Bankers Trust Company, respondent herein, has served not only as indenture trustee but also as depositary for the so-called Brewster Committee representing the bondholders, and in this latter capacity was allowed a maximum of $10,000 for its services. 249 I. C. C. 195, 236. It had sought an allowance of $12,000 (*id.*, p. 220). As depositary under a prior readjustment plan it had received $6,454.44 as compensation and $967.74 for disbursements (*id.*, p. 223).

organization proceedings. Its right to reimbursement arises solely out of the provisions of section 77 and is analogous to the right of equitable contribution. Compare *Trustees* v. *Greenough*, 105 U. S. 527. This contention is in accord with the holding in *New York, N. H. & H. R. Co. Reorganization*, 247 I. C. C. 677, 696, and *St. Louis-S. F. Ry. Co. Reorganization*, 249 I. C. C. 195.

III

The Commission submits that the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. sec. 41 (28) and 44; Judicial Code, sec. 207) is not available for review of Commission orders fixing maximum limits of compensation and expenses under subsection (c) (12).[1] *Chicago & N. W. Ry Co.* v. *United States et al.*, Dist. Ct. for Nor. Dist. of Ill. No. 2810, May 29, 1941, not reported. Compare also *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172; *United States* v. *Griffin*, 303 U. S. 226, 235, 237. As shown in the last cited case, the rationale of the applicability of the Deficiencies Act is its applicability in fact. The Commission's orders under section 77 are not of a kind for which review under the Urgent Deficiencies Act is intended. The bankruptcy statute prescribes a complete procedure for review by the district court of the Commission's order approving

[1] This point is raised in the brief *amicus curiae* in behalf of the Trustees of the New York, New Haven and Hartford Railroad.

a plan of reorganization, a type of review which differs from that under the Urgent Deficiencies Act. An order prescribing a plan would fall within the term "any order" equally with an order prescribing maximum allowances as well as other orders under the reorganization powers. It seems plain that such orders were not intended to be subject to review by a separate and distinctive procedure. In particular, the fixing of maximum allowances cannot have been intended to be reviewed by a special court of three judges, with appeal as of right to this Court. Cf. *Dickinson Co.* v. *Cowan*, 309 U. S. 382, 389.

IV

The Commission submits that the district court has no power to review or revise the findings of the Commission with respect to maximum limits under subsection (c) (12). Such findings present jurisdictional limits upon the district court comparable to the scale of compensation prescribed by section 48 of the Bankruptcy Act.

No valid constitutional objection can be raised to the procedure which the statute requires indenture trustees, along with other applicants for allowances, to pursue. The procedure is no different in substance from that which has long obtained with respect to claims for reparation brought by shippers against carriers to recover unreasonable or discriminatory charges. It is well settled that a shipper cannot "maintain his action for reparation in the absence of an order by the Interstate

Commerce Commission finding that the established schedule whereby the additional [charge] * * * per ton was exacted was unjustly discriminatory, determining what reparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the reparation indicated." *Robinson* v. *Baltimore & Ohio Railroad*, 222 U. S. 506, 508. This rule is applicable whether the shipper attempts to present the claim in a state or a federal court; and in view of the fixed doctrine that primary resort must be had to the Commission in matters involving issues of technical or administrative judgment, the rule cannot rest on any principle of election of remedies. *Louisville & Nashville Railroad Company* v. *Ohio Valley Tie Company*, 242 U. S. 288; *Standard Oil Company* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 394; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 140, n. 23. Reparation claims, like those for allowances of fees, are claims by one private party against another; and they were grounded in a common law right.[1] The fact that an indenture trustee has a

[1] "The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts." *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fé Railway Company*, 284 U. S. 370, 384–385.

contract calling for reasonable compensation does not, of course, fetter the constitutional power of Congress as it otherwise exists and is evidently conceded to exist. "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 308. The power in the present case may be rested both on the commerce clause, compare *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, and on the bankruptcy clause, particularly since the issue relates to fees for services performed as an incident to the bankruptcy proceedings themselves.

CONCLUSION

The decree of the Circuit Court of Appeals should therefore be reversed.

Respectfully submitted.

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